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## **Ethical Basis of the Law of Defamation**

That there is a wide discrepancy between the law and first class ethical principles is the general assumption of the lay public and the not infrequent admission of the legal profession. The layman speaks of one's actions as being "just within the law," and the inference therefrom is not illdisguised. It is meant to be anything but complimentary. It immediately suggests that the person indicated is unscrupulous and derelict in his duty, as measured by the ethical canon of the speaker. It is, in fact, the frequent aspersion cast upon the law that the moral principles of our jurisprudence constitute no worthy pattern of conduct for the decent, self-respecting citizen. In short, the failure of the law to coincide with what is generally conceded to represent the highest moral doctrine of the time and place, is assumed to be the shortcoming of the law. High minded men pride themselves upon the breadth of the margin between their conduct and that upon which the

law fixes its penalty, and he who is content to comply only with the letter of the law, incurs their righteous indignation and just censure.

The analytical jurists long ago pointed out the fundamental distinction between law and morals.<sup>1</sup> Perhaps the greater danger lies in the failure to recognize the relationship between the two. The layman condemns the law for failing to coincide with morality while the lawyer is apt to boast of the fact that law is one thing, morals another. Either view seems to ignore the correct relation which the one bears to the other. It will not be possible here to consider the manner and method of the incorporation of moral content into legal precepts, depending upon the particular **form** of law in which the legal command is embodied. It is possible, however, to investigate the extent to which some legal rules comply with the demands of ethics, together with what seems to be the reasons therefore. The law of defamation apparently offers some intelligible illustrations of this process in the development of our jurisprudence.

At the outset it should be recognized that a considerable discrepancy should be expected between the law and the doctrines propounded by the more progressive moral thinkers and teachers. The dogma of the law reflects but tardily the spirit and belief of an age and a people. While the law, in some instances, may be suddenly and radically changed by legislative enactment, the broader principles of the common law have evolved for the most part by slow degrees and by gradual processes, and moral and ethical generalities have been incorporated into the law only when they have become thoroughly established by the ex-

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<sup>1</sup>See Pound, *Theory of Judicial Decision*, 36 Harv. L. Rev. 641, 659 (1923).

perience of men as valid and sound and practical.<sup>2</sup> It follows that ethics, as a science, must precede the law. New and novel principles must prove their worth before they will find a place in the common law. The law, builded as it is on pragmatic considerations, has ever maintained a consistant conservatism, and it is largely this conservative tendency that has given it the stability necessary to perform the functions which society demands of it. In treating the matter of defamation, the law was early brought face to face with a moral problem of great delicacy. The solution which has been worked out slowly and cautiously, while not infallible, may not compare unfavorably with the axioms of many who regard their own moral dogma with scrupulous exactness. Fundamentally, at least, the rights and duties which the law has provided to protect one's interest in his reputation have not been inconsistent in theory with sound moral doctrine, albeit the method adopted by the law to meet the situation may differ from the method of ethics.

Certain defamatory words have been flatly prohibited by the law, being regarded as actionable *per se*. The specific kinds of remarks which constitute defamation *per se* may be largely due to historical accident, but the theory of such words seems sound enough. To falsely accuse one of crime has always been regarded as a wrong which the law would redress with proof of naught but the defamatory words.<sup>3</sup> The legal theory, of course, is that

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<sup>2</sup>For example, the development of tort liability in the action of trespass on the case for intentional, though indirect violations of property rights. Also the development of "motive" as determining liability for damage caused by the exercise of legal rights. Cf. *Allen vs. Flood* (1898), A. C. 1 with *Quinn vs. Leathem* (1901) A. C. 495. See also Ames, *How Far An Act May Be A Tort Because Of The Wrongful Motive Of The Actor*, 18 *Varv. L. Rev.* 411 (1905). Cf. German Civil Code, sec. 226: The exercise of a right is not permitted, when its sole object is to injure another.

<sup>3</sup>*Brooker vs. Coffin*, 5 Johns. (N. Y.) 188 (1809); *Pollock on Torts*, 242 (12th. ed.).

indemnity is provided for the injury to reputation. This is the gist of the action.<sup>4</sup> To accuse one of having a foul or contagious disease is actionable on its face, when false, for the reputation is so injured that ostracism from society is assumed to follow. Thus the court, in an early case, held that the publication of a doggeral accusing one of having the "itch" and "stinking of brimstone" was a libel, for, said the court, "nobody will eat, drink or have any intercourse with a person who has the itch and stinks of brimstone."<sup>5</sup>

So also it is actionable *per se*, for similar reasons, to employ language charging a want of chastity;<sup>6</sup> language calculated to injure one in his business, trade or profession; and words tending to hold one up to disgrace and ridicule before his friends.<sup>8</sup> Thus, it is actionable *per se* to call one a thief;<sup>9</sup> a murderer;<sup>10</sup> an embezzler;<sup>11</sup> a perjurer;<sup>12</sup> to say of one that he is affected of a foul and loathsome disease;<sup>13</sup> to say of one that he is a fornicator;<sup>14</sup> that a woman is a prostitute;<sup>15</sup> that a minister was drunk;<sup>16</sup> that a merchant uses false weights;<sup>17</sup> that a white man is

<sup>4</sup>See Odgers on Libel and Slander, 1 (5th. ed.).

<sup>5</sup>Villers vs. Monsley, 2 Wils. 403; 95 Eng. Rep. 886 (1769).

<sup>6</sup>Barnett vs. Ward, 36 Ohio St. 107 (1880). The rule was otherwise at an earlier stage of the common law. Roberts vs. Roberts. 5 B. & S. 384; 122 Eng. Rep. 874 (1864). See also Douglas vs. Douglas, 4 Idaho 193; 38 Pas. 934 (1895). In all states where the particular acts charged are made punishable by the criminal law, the words charging the acts are defamatory *per se*, as imputing the crime. See Newell, Slander and Libel, 140 (th. ed.).

<sup>7</sup>Ostrom vs. Calkins, 3 Wend. 163 (1830); Spence vs. Johnson, 142 Ga. 267; 82 S. E. 646 (1914).

<sup>8</sup>Wandt vs. Hearst's Chicago American, 129 Wis. 419; 110 N. W. 198 (1902).

<sup>9</sup>Little vs. Barlow, 16 Ga. 423 (1858); Van Hoozer vs. Butler. 131 Ark. 404; 199 S. W. 78 (1919).

<sup>10</sup>Widrig vs. Oyer, 13 Johns. (N. Y.) 124 (1816).

<sup>11</sup>Johnson vs. Shields, 25 N. J. L. 116 (1855).

<sup>12</sup>Cole vs. Grant, 18 N. J. L. 327 (1841).

<sup>13</sup>Monks vs. Monks, 118 Ind. 238; 19 N. E. 418 (1888); McDonald vs. Nugent, 122 Iowa 651; 98 N. W. 506 (1904).

<sup>14</sup>Page vs. Merwin, 54 Conn. 426; 8 Atl. 675 (1886).

<sup>15</sup>McKinney vs. Roberts, 68 Cal. 192; 8 Pas. 857 (1885); Klewin vs. Bauman, 53 Wis. 244; 10 N. W. 398 (1881).

<sup>16</sup>Hayner vs. Cowden, 27 Ohio St. 292 (1875).

<sup>17</sup>Pfeily vs. Henry 269 Pa. 533; 112 Atl. 768 (1921).

a negro.<sup>18</sup> All these have been held actionable as being defamatory *per se*.

The theory in holding such language actionable without proof of utterance, is that it has actually injured the reputation. The law seeks only to redress actual wrong, but as the experience of mankind has warranted some insults are regarded as so outrageous that the law assumes that they cannot fail to injure the reputation, so the defamed person will not be required to show how he has been injured, which, in some instances, might conceivably be hard to do.

On the other hand, words with less discourteous import have not been construed by the law to so shock the sense of decency that injury will be presumed to necessarily attend their utterance, and in this type of defamation, the injured party must show how and to what extent he has actually suffered, for the words are not actionable *per se*.<sup>19</sup> This distinction is based upon the theory, sound enough it would seem, that the law is in no sense a petty weapon which one may employ at his pleasure to retaliate for every provocation which he may suffer in his dealings with others.<sup>20</sup> If there be no actual damage to his reputation, he must stay out of court. Consequently to call one a "bluffer" has been adjudged not actionable *per se*.<sup>21</sup> It is true that one may not feel distinctly flattered to be called a "bluffer," but the expression is not so opprobrious that the law can assume that the reputation is materially injured thereby. Many men are notorious bluffers and enjoy enviable reputations in their community. Neither has it been adjudged as slanderous *per se* to say of one that he is a "bogus peddler;"<sup>22</sup> or to accuse one en-

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<sup>18</sup>Flood vs. News and Courier Co., 71 S. C. 112; 50 S. E. 637 (1905).

<sup>19</sup>Dailey vs. Bobbs-Merrill Co., 136 N. Y. S. 570; S. C. S. T. (1912).

<sup>20</sup>Walker vs. Tribune Co. 29 Fed. 827 (1887).

<sup>21</sup>Eislle vs. Walther, 4 N. Y. S. 385 (1889).

<sup>22</sup>Pike vs. Van Wormer, 5 How. Pr. (N. Y.) 171 (1850).

gaged in an ordinary calling of being drunk;<sup>23</sup> or to say of one that he has had consumption.<sup>24</sup> No moral turpitude or degradation is hereby connoted to an extent justifying an assumption that the person has suffered an injury to his reputation, so proof of such an injury is required to warrant a recovery in damages. Just where the line is to be drawn is, in theory, partly a matter of policy and partly one of accurate application of legal principles. The latter is in no sense a moral issue. Of the former we shall have more to say later.

All this is, of course, perfectly well known law. The distinction between words actionable *per se* and those requiring proof of special damages is significant here to indicate the real moral basis of the law with respect to defamation. Morally, perhaps, men should not say unkind things about their neighbors. Surely they should not say unkind things which operate to actually injure the reputation unless they are prepared to justify them. The law prohibits the latter, i. e. the actual injury to reputation. The advantages of undue litigation preclude the law from forbidding remarks of a mere discourteous import. Petty squabbles and the calling of names not positively vile, should not be carried to law for the mere sake of vindicating the feelings of the aggrieved person. The line must be drawn somewhere, so the law has flatly prohibited certain language, the effect of which may reasonably be expected to produce injury, by making them actionable on proof of utterance alone. Any other language must be shown to result in actual injury before the law will undertake to redress. In all cases, the effect of liability for defamation is to lend particular emphasis to that excellent admonition of scriptural morality—judge not lest ye be judged. In any event, it places upon one the onus of adjudging correctly, which is not an altogether bad moral

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<sup>23</sup>Torres vs. Huner, 150 App. Div. 798; 135 N. Y. S. 332 (1912).

<sup>24</sup>Rade vs. Press Pub. Co., 37 Misc. 245; 75 N. Y. S. 298 (1902).

principle.

Of more ethical significance is the attitude of the law toward the immemorial practice of gossip-monging. To report what someone else has said, for what it is worth, is often justified by the most circumspect gossipers, as a perfectly ethical pastime. More critical moralists, however, condemn it, as does the law. The law does not free from culpability him who but reports the defamatory language of another.<sup>25</sup> It has been invariably held that each repetition of a slanderous or libellous statement amounts to a fresh publication.<sup>26</sup> By repeating it, one thereby makes the defamatory matter his own. Perfectly logical, of course, is this rule, for it must be remembered that in every case the law is redressing an injury to reputation. Surely the broadcasting by continued repetition of injurious language affects the reputation quite as much, if not more than the original publication. The rule is well fixed in this regard, so that ingenuity in the manufacture of defamatory rumor is no more culpable than perseverance in repeating it. The rule is undoubtedly in accord with the highest ethical principles and its development has been influenced by purely moral considerations.

Of more significance, perhaps, than this clipping of the wings of gentle Fama, is the matter of truth as a defense in actions for defamation. Here a tremendous moral problem is presented, and the solution which has been worked out would seem to reflect singular credit to the law. Formerly the truth of the statements charged was regarded as a complete defense.<sup>27</sup> As observed by a court in one of the older cases in this country, "no general principles of right to damages can be founded in a publication of the truth, from the consideration that the reason for awarding damages fails. The right to compensation . . . is founded upon

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<sup>25</sup>Morse vs. Printing Co., 124 Iowa 707; 100 N. W. 867 (1904); Haines vs. Campbell, 74 Md. 158; 21 Atl. 702 (1891); Darling vs. Mansfield, 222 Mich. 278; 192 N. W. 595 (1923).

<sup>26</sup>Brewer vs. Chase, 121 Mich. 526; 80 N. W. 575 (1899).

<sup>27</sup>Odgers on Slander and Libel, 181 (4th. ed.).

deception and fraud to the detriment of the plaintiff. If the imputation is true, there is no deception or fraud and no right to compensation."<sup>28</sup> This may ignore the essential nature of the action, but the rule of law stated is in strict conformity with common law doctrine. Perhaps the sounder basis was expressed by another court, opining that "unless the charge made by the defendant against the plaintiff was false as well as malicious, the plaintiff has no right to recover damages from him. The falsehood of the charge is a necessary element in the plaintiff's case. He cannot complain of anyone for speaking of him nothing but the truth."<sup>29</sup>

This reasoning was cogent enough for the common law for a long time. It is not without merit. Inasmuch as damages are allowed for defamation by reason of injury to reputation, it may well be asked by what moral law one may insist upon the integrity of a better reputation than his character warrants. If it is not better than his character, statements of the truth can in no wise injure his reputation, and the truth should constitute a complete defense to an action for slander or libel.

When Puritanic ideals of ethics and morality began to give way in their harshness to more humanitarian doctrines, it became apparent that the truth was not necessarily a moral justification. It was a vicious principle, after all, which endorsed the telling of a nasty tale on the sole grounds that it was a true one. Men began to realize, too, that there was a double aspect to the situation. It was frequently unfair and, in some instances a great hardship upon the person defamed, and at the same time subversive of the public morals to permit such promiscuous and extravagant slanders. In many situations it was neither advantageous to the defamer nor to the public at large. On the other hand, there were some circumstances under which the public not only could justly demand know-

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<sup>28</sup>Castle vs. Houston, 19 Kan. 417 (1877).

<sup>29</sup>Ellis vs. Buzzell, 60 Me. 209 (1872).



ledge of the deficiencies in character of individuals, but it became one's obvious duty to furnish such information of this kind as came within his ken.

The law, then, had two conflicting interests to weigh. There was the interest of society in restricting foul and unnecessary evil talk and there was the interest of society in acquiring information of the infirmities of any of its members insofar as those shortcomings were likely to affect the public. The first interest was augmented by what appeared to be kindness and forbearance with respect to the individuals directly concerned, whereas the latter social interest was emphasized by the peril of those members of society who might deal with the persons in question to their sorrow. Some principle was demanded for this complex problem of moral issues which would adequately protect every interest involved. By degrees, the doctrine took shape and form, since expressed in statutes in a number of our states, that the truth, in actions for defamation, should constitute a complete defense only when accompanied by proof of good motives and evidence that the statements were made for justifiable ends, unless such statements were made under what has been called an absolute privilege. It is thus that a complete absence of malice, a typically moral situation, is necessary to vindicate defamatory remarks, although they be, in fact, true. As stated by the chief justice of the supreme court of Oregon, "every injurious publication of and concerning another, if it contains libellous matter, is presumed to have been made maliciously and this presumption continues until it appears that the matter charged as libellous is in fact true, and was published with good motives and justifiable ends."<sup>30</sup>

Here is complete accord between legal doctrine and first hand moral principles. It must be clear that in the main there is a great difference between the methods of

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<sup>30</sup>State vs. Mason, 26 Oregon, 273, 277; 38 Pac. 130 (1894).

ethics and jurisprudence. Ethics is eternally subjective, whereas the law is predominantly objective.<sup>31</sup> Ethics looks to the inner life of man; it seeks to perfect the motives of conduct; it strives to make man pure in heart. The law, on the other hand, has always been an institution primarily concerned with actual, manifest conduct. The purpose of the two sciences are different although the material dealt with, in many cases, is the same.<sup>32</sup>

Sometimes the law becomes apparently subjective, but usually the subjectivity is more apparent than real. Thus the criminal law seeks to ascertain the intent, but not the motive, in the commission of an act charged as criminal. Frequently, however, intent is but a fiction. The law often **presumes** intent from actual conduct; it insists that one committing certain acts under certain circumstances shall be deemed to have done so with a criminal intent, so that, after all, an objective standard constitutes the test for both conduct and intent, and the legal theory of things obscures the reality.<sup>33</sup> In treating the present problem of defamation, the law apparently compromises in method. It adopts the ethical viewpoint and looks to the motives of the defamer. The concession again is only partial, for certain presumptions must make it difficult for the slanderer to justify motives in situations where the subjective basis therefore is too highly intangible. The law must not wander too far from the path of objectivity, for it is by faithful pre perseverance here that the bulwarks against ignorance and stupidity are created and maintained. No man shall be permitted to deny the intent to produce the natural consequences of his own acts although it makes guilty him who may be, in truth and in fact, morally guiltless. The law is designed to protect society not only from the lusts of evil minds but as well from the stupidity of stunt-

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<sup>31</sup>See on the externality of the law, Holmes, *Common Law*, 110 ff. (1909).

<sup>32</sup>As to "identity of material and diversity of purpose," see Stammler, *Theory of Justice*, 44 (1925).

<sup>33</sup>See Salmond, *Jurisprudence*, 83 (7th. ed.).

ed intellects. For these reasons the ordinary prudent man or the hypothetically reasonable person is a spectre that haunts the "good" but thoughtless.

The exigencies of modern society which raise a moral duty for one to speak are so many that the law has concocted the ingenious device of privilege to rebut the presumption of malice which is raised by the utterance of words actionable *per se*. Privilege rests upon the moral grounds that some circumstances arise which justify the use of what would otherwise be defamatory language, regardless of the injury to individuals, by reason of the importance of the information thus conveyed to the public or to other individuals. One might be obligated by the highest ethical considerations to make statements which but indicate a suspicion on his part of another's depravity, the suspicions themselves eventually proving to be ill founded. One may speak on such occasions with impunity. It is thus that a legislator is absolved from blame and liability for remarks made upon the floor of the legislative chamber, be they ever so slanderous, providing, of course, that they are made in the course of legislative business and official proceedings.<sup>34</sup> And the privilege is a defense even though the statements be false.<sup>35</sup> The law regards the complete freedom from civil liability under these circumstances as more important than compelling the speaker to adhere strictly to what he knows to be true. There are political remedies for abuses of the privilege or lack of discretion in invoking it.

It is by reason of privilege also that one may feel free to criticize the government and those occupying positions of public trust and confidence. Particularly is this consistent with the political theory of representative government as well as such ethical principles as may support our doctrines of political science. As observed in the case of

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<sup>34</sup>Coffin vs. Coffin, 4 Mass. 1 (1808).

<sup>35</sup>Odgers, Slander and Libel, 231, 232.

**Chicago vs. Chicago Tribune**,<sup>36</sup> "when the people became sovereign as they did when our government was established under our Constitution, and the ministers became servants of the people, the right to discuss government followed as a natural consequence."<sup>37</sup> It is also privilege that subjects to what frequently amounts to the most galling criticism all purveyors of literary and artistic creations.<sup>38</sup> One who submits his efforts in art, philosophy, literature, music and the like, to the public for appraisal must not complain if that unfeeling and caustic abstraction receives them in a manner by no means reassuring to the author or composer. When, however, expressions of opinion and what purports to be criticism becomes wholly unfair and amounts to a personal attack upon the artist's character, the privilege is lost and the injured party may have his action.<sup>39</sup> An attorney, for language employed necessarily in the trial of a cause, may likewise invoke the protection of privilege,<sup>40</sup> as may witnesses for answers fairly made to questions while on the witness stand.<sup>41</sup> The theory, in each case, is the community of interests of the speaker and the auditor. In speaking with reference to an alleged slanderous charge of theft, a southern judge stated the grounds in the following terms:

<sup>42</sup>"Words falsely spoken to another, imputing a criminal offense are actionable *per se*, and the law presumes malice in their utterance, therefore it is not necessary in such case for the plaintiff in an action for slander to prove express malice, unless the words spoken constitute a privileged communication.

"A communication, although it contains criminal matter, is privileged when made in good faith upon any subject in which the party communicating

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<sup>36</sup>307 Ill. 595; 139 N. E. 86 (1923).

<sup>37</sup>139 N. E. 86, 88.

<sup>38</sup>See Newell, Slander and Libel, 547.

<sup>39</sup>Fraser vs. Berkley, 7 C. & P. 621; M. & R. 3 (1836).

<sup>40</sup>McDavitt vs. Boyer, 169 Ill. 475; 48 N. E. 317 (1897).

<sup>42</sup>Abraham vs. Baldwin, 52 Fla. 154; 42 So. 591 (1906).

has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest, right or duty and made upon an occasion to properly serve such right, interest or duty, and in a manner and under circumstances fairly warranted by the occasion and the right, duty or interest, and not so made as to unnecessarily or unduly injure another, or to show express malice."

It will be seen that privilege has well defined limits beyond which one passes at his peril. The conception of privilege is nothing more than a theoretical device which legal doctrine has originated to refute the legal inference of malice, that is, the defamatory statements are not made with good motives. The law has rightly placed the burden of proving good motives upon him who defames, but privilege removes the burden by suggesting that the particular circumstances of the utterance were such as to justify the language used. It is seen, then, that the essential element in defamation is malice, and malice is a matter of **moral** right and wrong. Originally the fact that the defamatory language was true was sufficient to repel the inference that words slanderous **per se** were uttered maliciously. Perhaps the effect of the law under this rule was to make legal malice impossible, regardless of actual malice. The law later developed to the point where it was not only necessary to show the truth of the statements, but an absence of malice must be shown as well, or, in other words, good motives and justifiable ends. The privilege, however, accomplishes the object of negative malice, and this even when the words used are false. "The term privilege," it has been said,<sup>43</sup> "as applied to a communication alleged to be libellous, means simply that the circumstances under which it was made are such as to repel the legal inference of malice, and to throw upon the plaintiff the bur-

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<sup>43</sup>Rotholz vs. Dunkle, 53 N. J. L. 438; 22 Atl. 193 (1891).

den of offering some evidence of its existence beyond the falsity of the charge."

Thus, although privilege is a defense, even though the words used be false, the magical effect of the protection may be lost. The refutation of malice is only **prima facie**. If the refutation can be overcome and malice actually shown to exist, the words, if false, become actionable, the privilege disappears and the defamer is liable.<sup>44</sup> This holds true for practically every privilege except that of the legislator and the judge when performing official duties.<sup>45</sup> In these two exceptions, the privilege is said to be "absolute," and the refutation of malice raised by the circumstances is impregnable. In other words, the presumption in these cases that no malice exists is a conclusive presumption, regardless of whether malice exists in fact or not. As has been suggested, the importance of immunity from civil proceedings and the existence of other remedies influence the law to devise the absolute privilege here, but in substantially all other cases of privilege there is but a qualified protection which is lost the moment actual malice is proved.

Thus it is that the machinery of the law of defamation functions. In the first place defamation is, in substance, injury to reputation. Certain kinds of language have come by such an accepted slanderous meaning that their very utterance constitutes defamation, regardless of actual injury—the law conclusively presumes injury. The law also presumes malice in the case of words defamatory **per se**. If defamatory words are to be justified by their truth, an absence of malice must be shown and the presence of justifiable ends. Every ingredient of defamation is then lacking; there is no **false charge**, **maliciously** made. If words are false, or if they are defamatory on their face, the

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<sup>44</sup>See Cardoza, J., in *Andrews vs. Gardner*, 224 N. Y. 440, 447; 121 N. E. 341 (1918).

<sup>45</sup>See Liddon, J., in *Coogler vs. Rhodes*, 38 Fla. 240, 248; 21 So. 109 (1897). See also Sloss, J., in *Gosewisch vs. Doran*, 161 Cal. 511, 514; 119 Pac. 656 (1911).

law presumes malice unless the existence of a privilege refutes this presumption, but if the privilege is negated by proof of actual malice, the protection is lost and the elements of actionable defamation are present.

From the part which falsity and malice play in determining liability, it is readily seen that the fundamental considerations involved are of an essentially ethical nature. No moral code places its stamp of approbation upon false witness or upon malicious or wanton wrong. To this extent, then, the law is enforcing, not moral precepts, but legal precepts which have been developed by the weight of ethical considerations. The law has come into accord with morals to this extent.

The complicated machinery of the law, involving privilege, burden of proof, presumptions, actual malice, legal malice and the like, are simply devices, awkward perhaps, but nevertheless effective, to aid in the practical application of legal doctrine to the affairs of men. Sometimes the effect of these technical agencies seems to disregard the realities of life and to ignore truth and fact. Yet this very objectivity of the law, this externality, is necessitated by a bigger reality than the particular instance of application. If the truth and facts of the specific instance seem to be ignored, by the force of legal presumptions, it must be because the law has its eye upon the truths and facts of life as a whole, and in the long run, the experience of many men is regarded as the only safe grounds upon which to fashion rules for the guidance of the conduct of society. It is no indictment of the law that it fails to accord with ethics in the specific instance. Law pertains to conduct; ethics to thinking. It is enough if the fundamental grounds for distinction and the basis for fixing liability are not inconsistent with ethical postulates. "As a man thinketh in his heart, so is he" to the moralist, but the law must confine its chief scrutiny to conduct. When precepts are laid down to govern conduct, it is not the heart subjective that must be considered, but the heart objective, the heart

of the average man, as indicated by his conduct. In law, thoughts are evidenced by actions. If men live together peaceably, jurisprudence must be content to let them live nobly, and perchance go to heaven, in some other way.

Insofar as ethical considerations have influenced the law to bring about a conformity between law and morals, rules of law are in accord with ethical principles. The purpose of law, however, is different, as is the method adopted to attain that purpose. We have seen that so far as the law of defamation is concerned, the rules of law are fundamentally based upon ethics. The operation of these rules, however, are peculiarly legal, and it is here that law and morals diverge. It might be helpful, however, to recognize the limitations of each science, and, by noting carefully the extent to which the one overlaps the other as well as the point of departure, to thereby ascertain some notion of the true relationship between the common law and Christian morality.

FOWLER VINCENT HARPER,

University of North Dakota